SUPREME COURT, U. S.

No. 1446

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IN THE

Supreme Court of the United States

THOMAS J. DODD,

Petitioner,

v.

DREW PEARSON and JACK ANDERSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 23, 1969

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IN THE

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THOMAS J. DODD,

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DREW PEARSON and JACK ANDERSON,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Thomas J. Dodd prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 24, 1969. The judgment of the Court of Appeals reversed a partial summary judgment for plaintiff which had been granted on plaintiff's motion by Judge Holtzoff of the United States District Court for the District of Columbia.

Opinions Below

The opinion of Judge Holtzoff granting plaintiff's motion for partial summary judgment, dated January 15, 1968 is reported at 279 F.Supp. 101, and is printed at pp. 1a-10a of the Appendix to this Petition.

The opinions of the Court of Appeals, not yet reported, are printed at pp. 11a-24a of the Appendix to this Petition.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision and judgment of the Court of Appeals were entered on February 24, 1969.

Questions Presented

1. When a newspaper columnist advises confederates, who are former and present governmental employees, that he will publish information contained in documents in the files of a United States Senator if the confederates steal them, and when he subsequently receives from the confederates, over a period of months, copies of thousands of documents surreptitiously and systemmatically stolen, knowing that they have been so stolen, and publishes some of their contents for his own personal profit, is the columnist liable for an invasion of privacy?

2. When a person receives copies of private files and letters which he knows have been stolen, and publishes their contents for his own personal profit, is he liable for conversion?

3. Does the imposition of liability for invasion of privacy or conversion in these circumstances infringe upon any right guaranteed by the First Amendment to the Constitution?

Constitutional Provisions Involved

First Amendment to the Constitution of the United States:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

Statement of the Case

The Court of Appeals adopted the District Court's summary statement of the undisputed facts established on plaintiff's motion for partial summary judgment:

> "On several occasions in June and July, 1965, two former employees of the plaintiff, at times with the assistance of two members of the plaintiff's staff, entered the plaintiff's office without authority and unbeknownst to him, removed numerous documents from his files, made copies of them, replaced the originals, and turned over the copies to the defendant Anderson, who was aware of the manner in which the copies had been obtained. The defendants Pearson and Anderson thereafter published articles containing information gleaned from these documents." (App. 2a; 279 F.Supp. at 102)

The uncontradicted evidence presented on the motion showed that on four separate occasions during the month of June 1965, James Boyd and Marjorie Carpenter, former employees of plaintiff, surreptitiously removed thousands of private papers from his files and copied them. (J.A. 207, 210, 230).[1] It was also established that from mid-

[1] References to "J.A. ...." are to page numbers of the Joint Appendix in the Court of Appeals which is a part of the certified record in this Court.

July through December 1965, Michael O'Hare and Terry Golden, then employed by plaintiff, removed additional thousands of documents from his files and copied them. (J.A. 231-35).

It was also established that copies of the stolen documents were delivered to defendants Anderson and Pearson and that they used the contents of many of them in newspaper columns published between January 24, 1966 and March 25, 1966. (J.A. 63, 64).

The circumstances leading up to the rifling of plaintiff's files and the publication of their contents were as follows:

James Boyd was, until December 1964, plaintiff's Administrative Assistant. At that time he ceased working in plaintiff's office, although he continued to do certain work at home and remained on plaintiff's payroll until May 1965. (J.A. 61-62). In March of 1965, Boyd met with defendant Anderson at Anderson's office. The appointment had been made by Anderson through two telephone calls which he had previously made to Boyd. (J.A. 216).

Between March and June, Boyd met with Anderson many times and, in the course of those meetings Boyd supplied to Anderson verbally information concerning plaintiff and his affairs. In the course of these conversations Boyd told Anderson that certain documentation was available and Anderson told Boyd that "it was necessary to obtain that documentation." Boyd told Anderson of his intention to go into plaintiff's office to obtain documents. (J.A. 217). Anderson told Boyd that to obtain the documents surreptitiously was, in his view, a "legally justified" but "risky" act. (J.A. 218). Anderson also told Boyd that if Boyd furnished the documents to defendants the defendants would keep them safely and would make them public.

(J.A. 219). The clandestine visits of June 1965 ensued.[2]

The evidence also established that defendant Anderson's secretary, Miss Opal Ginn, assisted Boyd in making xerox copies of the documents which had been removed from plaintiff's office. (J.A. 196, 199, 208-09, 212-13).

The record contains the following testimony by Michael O'Hare, another of the Senator's employees, as to his recruitment and participation in the project:

> ". . . Jim Boyd had spoken to me on a number of occasions during the month of July and August. He asked me finally around the middle of August 1965 if I would come out with him and meet with Jack Anderson. I agreed to this and after talking with Mr. Anderson, meeting him for the first time, hearing all that he did have in mind, sometime later convinced myself that his motives were honorable.
>
> • • •
>
> "*From the moment that I met with Mr. Anderson, and I agreed to help, I was a totally cooperating member of this group* who had as its goal to bring about an investigation of Senator Dodd.
>
> • • •

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[2] The sketchy affidavit submitted by Anderson in opposition to plaintiff's motion for summary judgment was insufficient to raise a genuine issue as to any of the above facts. Thus Anderson said only that he "advised [Boyd] against" going into plaintiff's office to obtain documents and denied telling him that it was the "right and proper thing to do." (J.A. 143). With respect to the source of the documents, Anderson's affidavit said only that when Boyd came to him with the documents he, Anderson, "did not know *exactly* how Boyd had obtained the documents." Anderson did not deny having emphasized the desirability of obtaining documents, having been told by Boyd that he intended to steal the documents, or having told Boyd that, if Boyd brought the documents to him, they would be published.

"My decision to help Mr. Anderson and Mr. Pearson was made neither lightly nor maliciously. I engaged completely. *I would have preferred that I had been able to separate myself from the office at the time that I agreed to cooperate with them. At their request I didn't leave the office. They said that they would like me to remain on for as long as I could.*

* * *

"*. . . for the period from mid-July until the time that I was off the payroll, I was cooperating entirely, committed in every way to assist Drew Pearson and Jack Anderson.*" (J.A. 546-547 (emphasis supplied)).[3]

Plaintiff moved for a partial summary judgment as to liability urging that, on the basis of facts as to which there was no genuine issue, defendants were liable to him for invasion of privacy or conversion or both. Judge Holtzoff held that the tort of conversion had been established but that invasion of privacy had not. The Court rejected plaintiff's contentions as to invasion of privacy "because the publications relate to his activities as a high-ranking public officer. . . ." (App. 9a; 279 F.Supp. at 105).[4]

The Court of Appeals agreed with Judge Holtzoff that no actionable invasion of privacy had been shown, but reversed his ruling that a conversion had been shown.

The Court of Appeals held, as plaintiff had urged, that the branch of the tort of invasion of privacy known as "intrusion" should be recognized in the District of Columbia. The Court of Appeals also agreed with plaintiff

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[3] For Mr. Boyd's corroborative description of these same events, see J.A. 231-8.

[4] References in the form "App. ...." are to the Appendix to this Petition.

that "The tort is completed with the obtaining of the information by improperly intrustive means" (App. 14a) and assumed, *arguendo*, that plaintiff's employees and former employees committed an actionable invasion of privacy ". . . when they removed confidential files with the intent to show them to unauthorized outsiders." (App. 15a). The Court of Appeals held, however, that defendants' conduct did not make them liable for an intrusion along with Boyd, Carpenter, O'Hare and Golden. The Court ruled that "injuries from intrusion and injuries from publication should be kept clearly separate" (App. 17a) and that "where the claim is that private information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained." (App. 17a)

On the conversion point, the Court of Appeals held that the information taken from plaintiff's files did not fall "under the protection of the law of property, enforceable by a suit for conversion." (App. 22a)

Judge Tamm, in a concurring opinion, observed that:

> "Conduct for which a law enforcement officer would be soundly castigated is, by the phraseology of the majority opinion, found tolerable; conduct which, if engaged in by government agents would lead to the suppression of evidence obtained by these means, is approved when used for the profit of the press. There is an anomaly lurking in this situation: the news media regard themselves as quasi-public institutions yet they demand immunity from the restraints which they vigorously demand be placed on government. That which is regarded as a mortal taint on information secured by any illegal conduct of government would appear from the majority

opinion to be permissible as a technique or modus operandi for the journalist." (App. 23a)

Judge Tamm stated that he concurred because he considered himself bound "under the doctrine of *stare decisis*," —without, however, identifying the authorities which he felt to be controlling.

Reasons for Granting the Writ

The writ should be granted in this case because it presents important issues as to the rights and duties of the press which have never been ruled on by this Court, and because the Court of Appeals has decided those issues in a way which threatens to erode dangerously the protection of public officials against unwarranted intrusions into their privacy.

The decision of the Court of Appeals goes to the heart of the sensitive and delicate problem of defining the rights and duties of a free press in the light of not only the individual interest in privacy, but also the public's interest in its officials having sufficient privacy in their own affairs to do their work effectively. The decision below, if allowed to stand, poses a serious threat. The central question is whether public officials shall have effective remedies against eavesdropping, theft of their files, electronic surveillance, and other intrusions into the privacy of their homes, conference rooms and offices, or whether, on the contrary, every legislator, cabinet member, and judge must, in exchanging communications with his advisors, assistants, family and friends, assume that every such communication may be stolen or intercepted, and published with impunity. There is a strong public interest in having the press disseminate to the public information

bearing on public questions and people. There must, however, be some limits on the means which the press can use to get that information.

While the issues involved may be, strictly speaking, questions of tort law of the District of Columbia, they involve the definition of the free press policy which is reflected in the First Amendment. They also involve the balancing of that policy against the right of individual privacy which is reflected in the Fourth Amendment's guarantee to the people of security in "their persons, houses, papers, and effects", a guarantee which this Court has defined in terms of "privacy of the individual, his right to be let alone. . . ." [5] It is the interaction of these policies that largely shapes the law of invasion of privacy. It is urgently necessary that this Court strike the proper balance in this important area.

This Court has, on occasion, reviewed decisions of the Court of Appeals for the District of Columbia Circuit on important common law questions.[6] Review is appropriate here both because the rules governing the remedies available to public officials for invasions of their privacy are especially important in the seat of our national government, and because the rule developed in the District is likely to have considerable precedential value affecting the development of the law in other jurisdictions over the country. Moreover, as is pointed out above, the peculiar relationship between the tort law governing invasions of privacy and Constitutional policies makes it particularly appropriate, and necessary, that the Court's voice be heard.

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[5] *Davis* v. *United States*, 328 U.S. 582, 587 (1946); see also Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L.Rev. 962 (1964).

[6] *Best* v. *District of Columbia*, 291 U.S. 411 (1934); *Reed* v. *Allen*, 286 U.S. 191 (1932).

1. *An Invasion of Privacy Was Shown.*

The anomaly, as a practical matter, of the conclusion reached by the Court of Appeals is obvious. The persons who stole plaintiff's papers were clearly guilty of an actionable intrusion, as the Court conceded for purposes of argument. They committed the tort when they took the documents from plaintiff's files without authority. If they had published the information themselves they would have been liable not only for the damages resulting from the intrusion, but for whatever additional damage flowed from the publication.[7] The Court of Appeals, however, held in this case that, if the intruders pass the information along to another person or group to do the publishing, the publishers themselves escape all liability, even though they were privy to the intrusion from the start—as the defendants were here.

The effect of the decision below is to provide a market for information which is obtained improperly and unlawfully and in violation of a public official's right to be protected against theft or surveillance. The Court of Appeals took pains to point out that "injuries from intrusion and injuries from publication should be kept clearly separate" (App. 17a) and stated the rule, quite extraordinary on analysis, that "where the claim is that private information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained." (App. 17a)

The consequence of these rules is that the intruder, whether by theft or electronic surveillance or otherwise,

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[7] *E.g., Fowler* v. *Southern Bell Telephone and Telegraph Co.*, 343 F.2d 150, 156 (5th Cir. 1965); *Hamberger* v. *Eastman*, 206 A.2d 239, 242 (N.H. 1965).

is liable only for the mental anguish resulting from the intrusion, without reference to the subsequent publication which spreads the information before the public. Since the intrusion itself, without any publication, does relatively little harm, these damages are likely to be small. The lawfulness of the publication, however, is, according to the Court of Appeals, to be tested without reference to the manner in which the information was obtained. If this is the test, whenever the intrusion is into the life and affairs of a public figure, recovery will generally be barred, both because most publications of lawfully obtained information about a public man are not invasions of privacy (since his life is already public), and because of the First Amendment guarantee that lawfully obtained information about public figures may be freely published unless it is maliciously false.

If the law follows the path charted by the Court of Appeals, the thief or eavesdropper need only assure himself in advance that someone else will do the publishing in order to insulate both himself and the publisher from liability. Conversely, the newspaperman who desires to obtain surreptitious access to private councils or private files need only find someone else to make the intrusion.

The threat posed is nicely illustrated by what happened here. Defendant Anderson initiated the contact with Boyd. Together they organized a team of intruders. Whatever the precise words that passed between Boyd and Anderson, Boyd knew before he stole the files that Anderson and Pearson would publish them and Anderson knew before the files were taken that they would be secured by stealth (see *supra*, at pp. 4-5).

If this Court endorses the rules enunciated by the Court of Appeals, and newspapermen take advantage of the opportunities which those rules give them, no public official's

private papers and thoughts will be safe from unauthorized disclosure and publication. This will trench, not only on the private rights of individuals who happen to be public officials, but also on the important public interest in having public business transacted in an atmosphere conducive to efficient and effective performance.[8]

Professor Alan Westin, in his recent and exhaustive study of privacy, pointed out that privacy is important not only as an aspect of individual liberty, but as an essential prerequisite for political liberty. He argues that the need for privacy, and the right to it, are as important to persons fulfilling public offices and functions as to private persons and that, indeed, society at large has a strong stake in the degree of privacy which a "public figure" may claim. Thus, Westin points out:

> "* * * privacy in governmental decision making is a functional necessity for the formulation of responsible policy. . . ." [9]

And he cites as examples of relationships in which privacy is essential:

> "* * * the staff relations of law clerks to judges, of military aides to commanding officers, and of legislative assistants to Senators and Representatives." [10]

Surely a judge is entitled to write a draft of an opinion, or a legislator a draft of a speech, with some assurance

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[8] While only the stealing and publishing of documents were challenged in the causes of action here at issue, the verbal communication of confidential information by Boyd and O'Hare (see J.A. 198-200, 233) in violation of their duty to plaintiff, was probably also actionable. RESTATEMENT, AGENCY 2D §312, comments *c* and *d* (1958).

[9] A. WESTIN, PRIVACY AND FREEDOM at 49 (1967).

[10] *Id.* at 47.

that his tentative or half-formed thoughts will not be stolen and published. Surely such officials are entitled to communicate their thoughts and ideas to friends, advisors, and associates without guarding their expression as they might if they knew those communications were to be made public.

The impracticable and dangerous ruling of the Court of Appeals rests, not on any persuasive precedent, but only on its own *ipse dixit.* No authority is cited for the proposition that one who knowingly uses the fruits of an intruder's work must escape liability (App. 16a-17a). No authority is cited for the proposition that "injuries from intrusion and injuries from publication should be kept clearly separate." (App. 17a) No authority is cited for the proposition that the determination whether the publication of information about a public figure is actionable "should not turn on the manner in which [the information] has been obtained." (App. 17a) Indeed, the effort of the Court of Appeals to fragment artificially the tort of invasion of privacy into a series of nicely separated compartments runs counter to the concept of this tort as a vindication of the unitary right to human dignity and individuality,[11] or what Warren and Brandeis referred to as "inviolate personality."[12] Full protection of that right ought not to be prejudiced by the drawing of arbitrary and unnecessary distinctions.

An examination of the cases indicates that the result reached by the Court of Appeals is contrary both to logic and to precedent. Defendants could properly be held liable on either of two theories—(1) that they parti-

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[11] Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,* 39 N.Y.U. L.Rev. 962 (1964).

[12] Warren & Brandeis, *The Right of Privacy,* 4 Harv. L.Rev. 193 (1890).

cipated sufficiently in the intrusion or its fruits to be liable with the intruders for the intrusion, or (2) that there is no privilege to publish information about a public man if the publisher knows that the information was unlawfully obtained for that very purpose.

The first proposition is supported by the principle generally recognized in the law that where a person knowingly participates in, and profits from, the fruits of an unlawful act, he is liable, along with the actual perpetrator, for damages flowing from that act. This has long been recognized, for example, with respect to the fruits of a conversion. As Judge Holtzoff said:

> "It is well settled, however, that a person who receives and uses the property of another that has been wrongfully obtained, knowing that it was so obtained, is likewise guilty of conversion and liable for damages." (App. 5a; 279 F.Supp. at 104).

After reviewing some of the very numerous authorities for this proposition,[13] Judge Holtzoff concluded:

> "It would be a work of supererogation to multiply authorities for this proposition of law, which is almost elementary." (App. 7a; 279 F.Supp. at 104).[14]

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[13] Judge Holtzoff cited, at App. 6a-7a: *Voss* v. *Baker*, 1 Cranch C.C. (1 Dist. Colum.) 104 (1802); *Rice* v. *Clark*, 8 Vt. 109, 110 (1836); *United Shoe Machinery Co.* v. *Holt*, 185 Mass. 97, 69 N.E. 1056 (1904); *Smith* v. *Briggs*, 64 Wis. 497, 25 N.W. 558 (1885); and *Kilmer* v. *Hutton*, 131 App. Div. 625, 116 N.Y. Supp. 127, 136 (1st Dep't 1909).

[14] Among the other cases which might be cited for this proposition are *Union Naval Stores* v. *United States*, 240 U.S. 284, 291 (1916); *Gratz* v. *McKee*, 9 F.2d 593 (8th Cir.), *cert. denied*, 270 U.S. 664 (1926); *Stull* v. *Porter*, 100 Ore. 514, 196 Pac. 1116 (1921); *Nisbet* v. *Lofton*, 211 Ky. 487, 277 S.W. 828 (1925); *Silsbury* v. *McCoon*, 3 N.Y. 379, 53 Am. Dec. 307 (1850); 52 AM. JUR., *Torts* § 115.

Prosser, in defining more generally the circumstances in which one may become liable as a joint tortfeasor, says:

> "All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him." PROSSER, TORTS § 43 at 259 (3d Ed. 1964).

The uncontroverted acts of defendants were sufficient to meet this test.[15] They ratified the acts of the intruders by accepting and using the fruits of the intrusion. They knew of the intrusion ahead of time and assured the intruders of an outlet for what they proposed to steal. They helped to organize the intruding group. The receipt and use of the fruits of the intrusion in these circumstances was enough to make the defendants liable.

Even if the defendants were not held liable for the intrusion, they could still be held liable for publishing information which they knew to have been wrongfully obtained. It is, of course, generally held that, by taking public office, a man forfeits some of the privacy to which he would otherwise be entitled. He may no longer object to being put in the limelight or to having his activities, at least those which bear some relation to his office, publicly scrutinized in the minutest detail. It does not follow, however, that he is barred from objecting to the publication of information which was wrongfully obtained. Indeed, the cases indicate otherwise.

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[15] The Court of Appeals suggested that it might be unfair to "hold one liable in damages who merely succumbs to temptation and listens [to information which an eavesdropper seeks to report.]" (App. 16a-17a) However that may be, it is not our case. Two important additional factors are present: first, defendants did not merely listen but published the stolen information for their own profit; second, they were privy to the intrusion from the beginning.

The case law is quite clear that a person in the public domain does not lose his right of privacy for all purposes. Thus, in *Klein* v. *McGraw-Hill, Inc.*, 263 F.Supp. 919 (D.D.C. 1966), the District Court stated that "a person whose activities have become part of the public domain is not entitled *to the same degree* of privacy as an ordinary . . . individual" (263 F.Supp. at 921) (emphasis added). That a public figure's right of privacy is merely limited and not abrogated is confirmed, for example, by cases holding that, no matter how much of a "public figure" a political candidate has become, he retains his right to privacy with respect to the use of his own name: *Battaglia* v. *Adams,* 164 So.2d 195 (Fla. 1964) (Richard M. Nixon); *State ex rel. Bunch* v. *Gray,* 125 So.2d 876 (Fla. 1960) (Orval Faubus); *State ex rel. LaFollette* v. *Hinkle,* 131 Wash. 86, 229 Pac. 317 (1924) (Robert M. LaFollette).

It has been said that "the private letters, even of celebrities, cannot be published without their consent", PROSSER, TORTS § 112 at 849 (3d Ed. 1964), and that "[T]he famous motion picture actress . . . unquestionably has as much right as anyone else to be free from intrusion into her home or her bank account. . . ." *Id.* at 848.[16]

It seems indisputable that whatever a United States Senator's residual right of privacy includes, it must include the right shared by all citizens to the security of his private papers. The papers stolen here included private letters and memoranda, private financial records, and personal income tax returns. (J.A. 183-85, 222, 235, 550). It is clear that, as a public figure, plaintiff may not object to any discussion of his performance of his public trust,

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[16] See also Spiegel, *Public Celebrity* v. *Scandal Magazine—The Celebrity's Right to Privacy,* 30 So. CAL. L. REV. 280 (1957) and *Smith* v. *Surratt,* 7 Alaska 416 (1926).

absent malice, since that is a legitimate subject of public interest. It must, however, be equally clear that defendants are not privileged, by reason of the public interest in plaintiff's activities, to attempt to satisfy that interest by burgling his home or office, or by encouraging or condoning such burglary by agreeing to accept and use its fruits.

As Judge Tamm pointed out in his concurring opinion, the acts perpetrated here would have been clearly improper and unlawful if performed by law enforcement officials. (App. 23a). In spite of the strong public interest in having crime detected and punished, law enforcement officials may not steal documents and use them to prove their case.[17] If the prevention of unlawful intrusions by Government officials is important enough to warrant excluding otherwise relevant evidence at a criminal trial, surely the prevention of unlawful intrusions by private vigilantes is important enough to warrant the imposition of liability on the defendants here. As Professor Bloustein has said:

> "A democratic state which values individual liberty can no more tolerate an intrusion on privacy by a private person than by an officer of government and the protections afforded in tort law, like those afforded under the Constitution, are designed to protect this same value." (*Loc. cit. supra,* 39 N.Y.U. L. Rev. at 994).

Our country's history has frequently demonstrated the truth of the proposition that the private vigilante can be

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[17] Indeed, there is considerable doubt that, even if they were stolen by private persons, law enforcement officials could use them as evidence. See *Note, Exclusion of Evidence Obtained by an Unreasonable Search in a Civil Action,* 48 Corn. L.Q. 345, n. 13 at 347 (1967).

a greater threat to individual liberty than the officials charged by law with the duty of detecting and punishing crime. In the light of that history it would be anomalous to permit to the lynch mob or the vigilante committee, or the sensational press, the use of instruments of surveillance and intrusion which the Constitution and the courts have denied to those charged by society with enforcing the laws.

2. *The Defendants Are Also Liable for Conversion.*

Judge Holtzoff found that Boyd, Carpenter, Golden and O'Hare were liable for conversion of plaintiff's documents and that defendants also became liable when they received and used the stolen information. He dismissed as "immaterial" the fact that the information was taken by copying the original documents rather than keeping them. (App. 7a). He regarded it as "well settled" that a person who "receives and uses the property of another that has been wrongfully obtained, knowing that it was so obtained, is likewise guilty of conversion and liable for damages." (App. 5a).

The Court of Appeals did not disagree with the proposition that one who receives and uses the fruits of a conversion is liable for conversion. Rather, it held that the dominion exercised over plaintiff's files by removing and copying them was insufficient to constitute the tort of conversion (because they were returned promptly, App. 20a) and that plaintiff's files, not amounting to "literary property, to scientific invention, or to secret plans formulated by [plaintiff] for the conduct of commerce," did not contain information which "falls under the protection of the law of property, enforceable by a suit for conversion." (App. 22a)

The Court of Appeals took too narrow and restrictive a view of the tort of conversion.

The Court ruled that in order for there to be a conversion there must be a "complete or very substantial deprivation of possessory rights in the property. . . ." (App. 19a). An examination of the authorities makes it clear that the Court overstated the extent of the interference with "possession" necessary to establish the tort.

Section 222A of I RESTATEMENT OF TORTS 2D (1965), the Section on which the Court relied, (hereinafter the "RESTATEMENT") indicates that there is considerable flexibility in the determination whether a particular interference with the owner's dominion amounts to conversion. Among the factors to be considered are "the actor's intent to assert a right in fact inconsistent with the other's right of control", the "actor's good faith", and "the inconvenience and expense caused to the other." In Section 227 the RESTATEMENT states the further proposition that:

> "One who *uses* a chattel in a manner which is a serious violation of the right of another to control its use is subject to liability to the other for conversion." (*Id.* at 443) (emphasis added).

And in Section 242(1) the RESTATEMENT says:

> "Where there is a conversion of a document in which intangible rights are merged, the damages include the value of such rights." (*Id.* at 473)

In Comment *b* to this latter section, reference is made to the fact that the rule has been applied to account books and receipts. The comment goes on to say:

> "The law is evidently undergoing a process of expansion, the ultimate limits of which cannot as yet be determined." (*Id.* at 474)

The Court of Appeals seemed to assume that withholding "possession" is the key element of the tort. The above references to the RESTATEMENT make it plain that this is not the law. As Dean Prosser has pointed out:

> "Conduct which is sufficiently aggravated to constitute a major defiance and infringement of the plaintiff's right, *such as the deliberate theft of the chattel,* may be sufficient in itself for a conversion, *even though the plaintiff promptly recovers the goods and suffers no actual harm.*" [18]

The gist of the tort is not the withholding of possession but dealing with the property in a way which is inconsistent with the rights of the owner.[19]

It is thus clear that the plaintiff's employees and former employees, and the defendants as well, dealt with plaintiff's files in a way which made them liable for conversion.

Moreover, contrary to the conclusion of the Court of Appeals, it has long been settled that even documents which have no literary or commercial value may be the subject of a conversion. Thus, in *Burdeau* v. *McDowell,* 256 U.S. 465 (1921), although this Court held that documents stolen by private persons and turned over to the United States Attorney were admissible in evidence,[20] it went on to say:

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[18] Prosser, *The Nature of Conversion,* 42 CORN. L.Q. 168, 184 (1957).

[19] *E.g., Pierpoint* v. *Hoyt,* 260 N.Y. 26, 29-30, 182 N.E. 235 (1932); *Comment, Conversion of Choses in Action,* 10 FORDHAM L. REV. 415, 415-16 (1941).

[20] The views of Holmes and Brandeis in dissent in that case probably represent the present law on this point. See *Elkins* v. *United States,* 364 U.S. 206 (1960); *Williams* v. *United States,* 282 F.2d 940, 941 (6th Cir. 1960) and Note, *Exclusion of Evidence Obtained by an Unreasonable Search in a Civil Action,* 48 CORN. L.Q. 345 (1967). Also, see, *Knoll Associates, Inc.* v. *Federal Trade Commission,* 397 F.2d 530, 536 (7th Cir. 1968).

> "We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned." (256 U.S. at 475)

The private papers in the *Burdeau* case did not constitute literary property or scientific invention any more than plaintiff's did here.

The common law has long afforded a remedy for the unauthorized taking and use of private letters and papers, and, contrary to the Court of Appeals' unsupported assertion, there is no requirement that papers can be thus protected only if they possess intrinsic monetary value by reason of their literary or scientific value. As long ago as 1765 Lord Camden put it this way, in a celebrated decision:

> "Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect." [21]

In another famous case of the same period, John Wilkes, a member of Parliament, recovered judgments totalling £5000 for the indiscriminate search of his papers pursuant to a warrant issued by Lord Halifax.[22]

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[21] *Entick* v. *Carrington and Three Other King's Messengers,* 19 Howell's State Trials 1029, 1066 (1765) quoted in *Boyd* v. *United States,* 116 U.S. 616, 627-28 (1886).

[22] See *Boyd* v. *United States, supra,* 116 U.S. at 626; for one aspect of that litigation, see *Wilkes* v. *Wood,* 19 Howell's State Trials 1153, 1166-68 (1763).

In *Clenden* v. *Dinneford*, 5 Car. & P. 13, 17, 172 Eng. Reprint 855, 857 (1831) the court held that "... finding (knowing there was no right to use) and keeping, reading, and communicating to others" the contents of letters and notebooks belonging to plaintiff was a conversion entitling plaintiff to nominal damages (although the papers in question were of purely personal interest). And in *Thurston* v. *Charles*, 21 Times L. Rep. 659 (K.B.Div., Eng. 1905) the court upheld a £400 award to the plaintiff for conversion and publication by defendant of a compromising letter which the plaintiff had received. The court said:

> "The defendant had no right to read the letter or to show it to anybody. The literary value of the letter in this case was not of importance, but he had no right to read or use the letter. . . . *It seems to me that in cases of this kind the property in a thing like a letter may be mainly valuable because it gives the plaintiff the right to keep it private.*" (21 Times L.R. at 659-660) (emphasis added).

In this country, the Court held in *Teal* v. *Felton*, 53 U.S. 284, 292 (1851) that wrongful refusal by a postmaster to deliver letters or newspapers would be "a conversion for which suit may be brought." And Harper and James note, generally, that:

> "... letters ... may be the subject of conversion." [23]

The Court of Appeals' novel position on this issue is plainly contrary to all precedent.

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[23] 1 HARPER & JAMES, TORTS § 213 at 135 (1956); see also *Annot., Nature of Intangible Property Subject to Conversion*, 44 A.L.R.2d 927, 946 (1950) ("Letters or other matter of that nature may be the subject of an action for conversion.")

The law of conversion is not so rigid or inflexible that it cannot support a recovery here. Defendants received documents from persons who had stolen them, knowing how they had been acquired. The interference with plaintiff's dominion over his files was intentional and flagrant, and sufficient to constitute a conversion. Defendants destroyed one of the characteristics of those files forever—their privacy. By destroying their privacy the defendants reaped a profit. It is not unjust to require them to respond in damages.

3. *The First Amendment Does Not Bar a Recovery.*

Contrary to defendants' argument, made in both courts below, the requirement of the First Amendment that recovery for libel concerning a public official can be had only where "malice" is shown has no application here.

This Court decided in *Adderley* v. *Florida*, 385 U.S. 39 (1966) that freedom of speech does not include freedom to commit a trespass. The Court stated there that the concept of constitutional law "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please" is rejected. (385 U.S. at 48). The same proposition was stated by this Court in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), where the Court said:

> "The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others. A business 'is not immune from regulation because it is an agency of the press. *The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade*

the rights and liberties of others.' Associated Press v. *Labor Board,* 301 U.S. 103, 132-133" (388 U.S. at 150) (emphasis added).

This Court in *Butts* further explained that the "outer limits" of free speech do not serve to shield from liability conduct which is, as a matter of law, tortious, merely because of a claimed relationship between the tortious conduct and some desire to engage in protected speech. The Court said:

"*. . . . neither the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication.* It is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press. *Impositions based on misconduct can be neutral with respect to content of the speech involved . . .*" (388 U.S. at 152-53) (emphasis added).

In this case, it is the defendants' tortious misconduct in securing information that is the basis for the imposition of damages, rather than the content of any articles which they have published.

Defendants in this case received more than four thousand documents which they knew to have been stolen from plaintiff's office over a period of six months. They used the fruits of this theft to publish a series of 100 scurrilous columns in a manner calculated and intended to destroy the plaintiff. They plainly violated one federal statute and probably violated several others in the process.[24] It

[24] It would appear that defendants are clearly guilty of violating a criminal provision of the Internal Revenue Code, since among the stolen documents were copies of plaintiff's tax returns. (26

is frivolous to suggest that the freedom of the press would be impaired by holding these defendants responsible in damages for their conduct.

It has been repeatedly held that members of the press do not possess any broader constitutional rights, with respect to their conduct in gathering information and news, than do members of the American public generally.

For example, it appears to be uniformly the rule that reporters who violate court rules forbidding the photographing of court proceedings may be punished for contempt in the same manner as any other citizen.[25] It has also been held that the police have the right to exclude reporters, along with other members of the public, from the scene of a fire, so long as it is done without discrimination.[26]

U.S.C. § 7213). Moreover, they are probably guilty of other offenses, as accessories if not as principals. The conduct of plaintiff's ex-employees described above probably constitutes a violation of the following criminal statutes contained in the District of Columbia Code: § 22-1211 (taking property without right); § 22-1801 (housebreaking); either § 22-2201 (grand larceny) or § 22-2202 (petit larceny) depending on the value of the documents taken; and § 22-2203 (larceny after trust). Their conduct also probably violated 18 U.S.C. § 1905 (disclosure of confidential information). Defendants' activities in association with the ex-employees might well render them liable for these violations as accomplices or accessories, if not principals, or as conspirators pursuant to 18 U.S.C. § 371 (conspiracy) and as principals in violating 18 U.S.C. §§ 2314, 2315 (interstate transportation of stolen goods).

[25] See, *e.g.*, *Tribune Review Publishing Co.* v. *Thomas*, 254 F.2d 883, 884-85 (3d Cir. 1958); *Seymour* v. *United States*, 373 F.2d 629, 631-32 (5th Cir. 1967); *United Press Associations* v. *Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954). In the latter case, Judge Fuld (now Chief Judge) pointed out that the First Amendment's guarantee of freedom of the press *"has . . . never been held to confer upon the press a constitutionally protected right of access to sources of information not available to others"* (123 N.E.2d at 778) (emphasis added). See also *Brumfield* v. *State*, 108 So.2d 33 (Fla. 1958) (affirming contempt convictions of photographers).

[26] *Dayton Newspapers, Inc.* v. *Starick*, 345 F.2d 677 (6th Cir. 1965).

In the *Tribune Review Publishing Co.* case, *supra* note 24, the Third Circuit upheld the lower court's refusal to enjoin enforcement of a Pennsylvania County Court rule forbidding the taking of photographs in or near a court house. The opinion held that the press has no special right of access to events, beyond that of the general public, and distinguished sharply between freedom of expression which is protected, and freedom of access—which is not. The District Court for the District of Columbia recognized the very same principle in *Trimble* v. *Johnston,* 173 F.Supp. 651 (D.D.C. 1959), in holding that the press has no special privilege, conferred by the Constitution, to secure access to non-public governmental records.

It has also been repeatedly held that a newspaperman, in spite of his desire to travel abroad in order to gain information and news with which to inform the American public, has no First Amendment right to avoid State Department travel restrictions applicable to the public generally. *Worthy* v. *Herter,* 270 F.2d 905 (D.C. Cir.), *cert. denied,* 361 U.S. 918 (1959).[27] In that case, the Court recognized that a newspaperman's freedom of travel is an important element in fredom of the press; but stated:

> "Merely because a newsman has a right to travel does not mean he can go anywhere he wishes. *He cannot attend conferences of the Supreme Court, or meetings of the President's Cabinet, or executive sessions of*

[27] See also *Frank* v. *Herter,* 269 F.2d 245 (D.C. Cir.), *cert. denied,* 361 U.S. 918 (1959) (writer and teacher wanting to travel to Red China); and *Worthy* v. *United States,* 328 F.2d 386 (5th Cir. 1964) (affirming conviction for unlawful entry after Worthy traveled to Cuba and returned without a valid passport). While the decision in *Lynd* v. *Rusk,* 389 F.2d 940 (D.C. Cir. 1967) may to some extent qualify the ruling in *Worthy* v. *Herter* with respect to the authority of the State Department to restrict travel, it in no way derogates from the ruling that newsmen are to be treated the same as other citizens.

> *Committees of the Congress. He cannot come into my house without my permission,* or enter a ball park without a ticket of admission from the management, or cross a public street downtown between crosswalks. He cannot pass a police cordon thrown about an accident, unless he has a pass from the police." (270 F.2d at 908) (emphasis added)

To give First Amendment protection here would be contrary to the cases cited above and would constitute a ruling, in essence, that a reporter is free to obtain information about a public figure in any manner he sees fit, whether consistent with law or not, and to publish it for his own or his publication's profit, so long as it cannot be proved that he knew the publication to be untruthful under the rather easy standards of journalistic virtue permitted by *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and its progeny.

It is submitted that "under the conditions of today, when privacy is imperiled by the communications explosion, and by a deplorable eruption of all manner of mechanical and electronic devices for snooping," *Afro-American Publishing Co.* v. *Jaffe,* 366 F.2d 649, 653 (D.C.Cir. 1966), the courts must be vigilant to preserve the time-honored principles of privacy which are fundamental to our freedom. It is not possible to find in the First Amendment any endorsement of conduct so destructive of individual liberty in an ordered society.

To allow intrusion of this sort is incompatible with any reasonable concept of individual liberty, and, when a public official is involved, it is incompatible with the functioning of an effective government.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 23, 1969

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1193-66

THOMAS J. DODD,

Plaintiff,

v.

DREW PEARSON and JACK ANDERSON,

Defendants.

Opinion of the District Court

The problem presented in this case is whether a person who receives copies of documents that have been purloined from another and uses the information contained in them, knowing that the originals have been purloined, is liable for damages to their owner. This question is answered in the affirmative to the extent that an action for damages lies under such circumstances. The Court expresses no opinion at this stage as to the measure of damages, and, in fact, whether substantial damages may be recovered under the circumstances of this case.

The plaintiff, Thomas J. Dodd, is a Senator of the United States. The defendants, Drew Pearson and Jack Anderson, are journalists, who write an article daily, popularly known as a "column". These articles are published more or less simultaneously in numerous newspapers throughout the United States. The plaintiff alleges in his second amended

complaint that some of his former employees entered his offices without authority, rifled his files, purloined numerous papers, made copies of them, and delivered the copies to the defendants, who knew that the copies had been made from papers unlawfully obtained. The plaintiff further avers that the defendants from time to time published information contained in these papers, and sues for damages. The plaintiff moves for partial summary judgment solely on the issue of liability, leaving the question of the measure of damages for later consideration.[1]

It appears from the record submitted on this motion that the following salient facts are established. On several occasions in June and July, 1965, two former employees of the plaintiff, at times with the assistance of two members of the plaintiff's staff, entered the plaintiff's offices without authority and unbeknownst to him, removed numerous documents from his files, made copies of them, replaced the originals, and turned over the copies to the defendant Anderson, who was aware of the manner in which the copies had been obtained. The defendants Pearson and Anderson thereafter published articles containing information gleaned from these documents.[2]

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[1] Rule 56(d) of the Federal Rules of Civil Procedure in effect permits the granting of a partial summary judgment.

[2] Rule 9(h) of the local Rules of this Court, provides

"*Motions for Summary Judgment.* In addition to the points and authorities required by sub-paragraph (b) of this Rule there shall be served and filed with each motion for summary judgment . . . a statement of the material facts as to which the moving party contends there is no genuine issue.

"Any party opposing the motion, may, not later than three days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which

The problem presented in this case can best be considered in juxtaposition with the decision of this Court in *Liberty Lobby, Inc.* v. *Pearson,* 261 F. Supp. 726. The cause of action involved in that case was very similar to the one presented here. The complaint alleged that an employee of the plaintiffs unlawfully and in breach of confidence copied certain confidential letters from their files and turned the copies over to the defendants, who were able to publish their contents, or the information contained in them. The action sought an injunction and damages. The matter came before this Court solely on a motion for a preliminary injunction against the publication of the information. The Court denied the application on the ground that to restrain publication would encroach on the freedom of the press. This decision was affirmed by the Court of Appeals (December 27, 1967, not yet reported). This Court restricted its opinion in the *Liberty Lobby* case to the question whether an injunction should issue. It pointed out the limitation in the following manner:

"The Court does not have before it at this time the question whether the plaintiffs have a good cause of

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it is contended there exists a genuine issue necessary to be litigated.

"In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion."

The facts stated in the text of this opinion are taken from plaintiff's statement of material facts, supported by depositions, affidavits and similar material. The defendants' counter-statement of genuine issues of fact raises issues concerning matters that the Court considers immaterial to the question to be determined on this motion.

> action for damages for conversion of the letters or for breach of trust or any other similar tort. . . . The only matter that the Court has before it at this time is the question whether it may enjoin newspaper men from publishing copies of documents or information contained in documents that the newspaper men consider newsworthy, merely because the information or copies were obtained by a breach of trust."

The Court answered the question in the negative. In the case at bar, we are confronted with the converse query, namely, whether an action for damages would lie under such circumstances.

Freedom of the press comprizes freedom to publish. It liberates the press from prior restraint. It precludes equity from enjoining a publication. Nevertheless, the publisher is subject to the consequences of his act. Freedom of the press does not confer immunity from liability for a tort or from an action for damages. For example, the publication of a libel may not ordinarily be enjoined, but having published a defamatory statement, the publisher is subject to an action for damages. Similarly, freedom of the press does not comprize an unrestrained and untrammeled right of access to sources of information for use in publication.

In *Trimble* v. *Johnston*, 173 F. Supp. 651, 655, this Court wrote as follows:

> "Freedom of the press comprehends a right to print and publish and to disseminate, circulate, and distribute matters that have been printed, without prior restraint, without license, without censorship, and without discriminatory taxation, but subject to the consequences of the law of libel and to the criminal penalties imposed

by such laws, as those that ban obscenity, fraud, incitement to crime, espionage and the like, or that protect the needs of national defense and security. The press is not liberated, however, from amenability to law generally. For example, newspaper publishers and press associations are subject to the National Labor Relations Act, 29 U.S.C.A. §151 *et seq.*, the Fair Labor Standards Act, 29 U.S.C.A. §201 *et seq.*, and the Antitrust laws, 15 U.S.C.A. §1 *et seq.* The liberty of the press does not include any legal right of securing assistance from public officials in procuring information that it is desired to print. It does not comprise any alleged right of access to material not available to others, any more than it would include the privilege of attending closed meetings at which news of interest might possibly be gathered."

It follows that the question whether under circumstances presented in the case at bar and in the *Liberty Lobby* case, *supra*, the defendants are liable to an action for damages, is governed by different principles than the issue whether an injunction may be granted against the publication of copies of documents illegally obtained by persons who transmit them to the publisher.

On the uncontroverted facts, the individuals who without authority entered the plaintiff's office, rifled his files, removed documents and made copies of them, which they turned over to the defendants, would be liable for damages in trespass and conversion. They are not being sued. It is well settled, however, that a person who receives and uses the property of another that has been wrongfully obtained, knowing that it was so obtained, is likewise guilty of conversion and liable for damages.

This principle was recognized in an early case in the District of Columbia, *Voss* v. *Baker,* 1802, 1 Cranch C. C. (1 Dist. Col.) 104. The report of that case contains the following statement:

> "Trespass for breaking up a scow. The Court instructed the jury that if the defendant, knowing that Tuel committed a trespass in taking and breaking up a scow of the plaintiff, received from Tuel the timbers and planks of the scow, knowing them to be the property of the plaintiff, which had been so taken, he is answerable in this action, being equally as guilty as Tuel."

In *Rice* v. *Clark,* 8 Vt. 109, the master of a ship lent its anchor to the defendant without the permission of the owner of the vessel. The defendant was held liable in conversion. The Court stated:

> "If he [i.e. the master] did lend or sell any part of the boat without permission from the owner it was a conversion of the property, and equally a conversion in the defendant who, with a full knowledge of all the facts, hired the anchor of one who had no authority to make such a contract." (p. 110.)

In *United Shoe Machinery Co.* v. *Holt,* 185 Mass. 97, 69 N.E. 1056, the Court stated:

> "In an action of trover the seller and the purchaser can be jointly held liable (p. 1057)".

In *Smith* v. *Briggs,* 64 Wis. 497, 25 N.W. 558, one Briggs wrongfully entered on plaintiff's lands, cut a large quantity of timber and sold it to one Sherry. The Court held

that both Briggs and Sherry were liable for damages in conversion as joint tort feasors.

In *Kilmer* v. *Hutton,* 131 N.Y.App.Div. (1st Dept.) 625, 116 N.Y.Supp. 127, 136, the Court wrote as follows:

> "When property has been converted by one person and afterwards delivered to another, trover may be maintained against the latter as well as against him who originally converted it."

That case involved a wrongful delivery of stock certificates to persons not entitled to receive them.

It would be a work of supererogation to multiply authorities for this proposition of law, which is almost elementary. It is clear, therefore, that on the undisputed facts, the defendants are liable to the plaintiff for damages on the theory of conversion. The mere fact that the defendants received copies of the documents from the trespassers who purloined the originals, instead of the originals themselves, is, of course, immaterial. What the measure of damages should be and whether substantial damages may be recovered under the circumstances, is a matter to be determined at a later stage of this litigation.

Plaintiff's counsel advance an additional alternative theory on which they seek to predicate the plaintiff's right to recover, namely, violation of the right of privacy. The right of privacy has been developed and has gradually gained recognition in the law of torts since the turn of the century. This Court in *Peay* v. *Curtis Pub. Co.,* 78 F. Supp. 305, held that it formed a part of the law of the District of Columbia. This view has been approved by the Court of Appeals for the District of Columbia, citing the *Peay* decision among others with approval, *Afro-American Publishing Co.* v. *Jaffe,* 125 U.S. App. D.C. 70, 74, 366 F. 2d 649, 653.

As this Court stated in the *Peay* case, the right of privacy has been broadly described as "the right to be let alone" (p. 307). The publication of a photograph of a private individual without his sanction, or depicting events in his personal life that are of no public interest, are illustrative violations of the right of privacy. It is a right to keep the noiseless tenor of one's way along the cool sequestered vale of life without intrusion on the part of the public. There are those who shun publicity and who deplore and even resent any attempt to cast a public gaze on any aspect of their personal life. The law respects this attitude and lends sanction to it by way of an action for damages for its infringement. There are, however, important limitations on the right of privacy. It does not extend to matters of public interest, or to persons properly in the public eye, at least as to matters other than features of their intimate life, *Bernstein* v. *National Broadcasting Co.*, 129 F. Supp. 817, 828, affirmed 98 U.S. App. D.C. 112.

The *Restatement of the Law of Torts* recognizes the right of privacy. It defines it as follows (§867):

> "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."

The *Restatement* likewise formulates the exception to this right, which has already been discussed. It states (§867):

> "*Conflict of interests.* The rule stated in this Section gives protection to the interest which a person has in living with some privacy, but this protection is relative to the customs of the time and place and to the habits and occupation of the plaintiff. . . if he submits him-

> self or his work for public approval, as does a candidate for public office, a public official, an actor, an author or a stunt aviator, he must necessarily pay the price of even unwelcome publicity through reports upon his private life and photographic reproductions of himself and his family, unless these are defamatory or exceed the bounds of fair comment."

An illuminating discussion of the law of privacy and its limitations is found in *Prosser on Torts,* 635, 638, 642.

The Court concludes that the publication of the material of which the plaintiff complains is not protected by the cloak of the right of privacy, because the publications relate to his activities as a high-ranking public officer, namely, Senator of the United States, in which the public has an interest.

It follows hence that the plaintiff is entitled to recover damages in this case, but only on the theory of a conversion and not on the theory of a violation of a right of privacy. The distinction is not purely theoretical, as a more liberal, flexible and broad measure of damages may perhaps be applicable to actions for invasion of privacy, than govern actions for conversion.

The Court will, therefore, render partial summary judgment adjudicating that the plaintiff has a right to recover damages solely on the theory of conversion of his property. The measure of damages is an important subject that will have to be determined at the trial. Ordinarily, damages for conversion of personal property are the value of the property. In this instance the property consists of documents. Naturally, their value is not confined to the cost of the paper on which they are written. Documents may have intrinsic monetary value as, for instance, a manuscript

being prepared for publication. If by improperly obtaining the manuscript and making it public the defendant destroys its salable value, the plaintiff is entitled to recover the value of the manuscript. In this instance, apparently the plaintiff seeks to recover damages for injury to reputation, personal embarrassment and mental anguish. Whether recovery of such damages may be had in an action for conversion and, in fact, whether on the facts of this case the plaintiff may recover substantial damages at all, must be left for determination at the trial.

Counsel may submit an order in accordance with the foregoing ruling.

ALEXANDER HOLTZOFF
United States District Judge.

January 15, 1968.

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,910

DREW PEARSON and JACK ANDERSON,

Appellants,

v.

THOMAS J. DODD,

Appellee.

INTERLOCUTORY APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided February 24, 1969

Before WRIGHT, TAMM and ROBINSON, *Circuit Judges.*

WRIGHT, *Circuit Judge*: This case arises out of the exposure of the alleged misdeeds of Senator Thomas Dodd of Connecticut by newspaper columnists Drew Pearson and Jack Anderson. The District Court has granted partial summary judgment to Senator Dodd, appellee here, finding liability on a theory of conversion. At the same time, the court denied partial summary judgment on the theory of invasion of privacy. Both branches of the court's judgment are before us on interlocutory appeal.[1] We affirm the Dis-

[1] The operative part of the District Court's order stated "that the defendants are liable to the plaintiff on the theory of conversion of documents belonging to the plaintiff, but not on a theory of inva-

trict Court's denial of summary judgment for invasion of privacy and reverse its grant of summary judgment for conversion.

The undisputed facts in the case were stated by the District Court as follows:

> "* * * [O]n several occasions in June and July, 1965, two former employees of the plaintiff, at times with the assistance of two members of the plaintiff's staff, entered the plaintiff's office without authority and unbeknownst to him, removed numerous documents from his files, made copies of them, replaced the originals, and turned over the copies to the defendant Anderson, who was aware of the manner in which the copies had been obtained. The defendants Pearson and Anderson thereafter published articles containing information gleaned from these documents." [2].

I

The District Court ruled that appellants' six newspaper columns concerning appellee, which were attached to appellee's complaint, did not establish liability for the tort of invasion of privacy. That tort, whose historical origin lies in the famous Warren and Brandeis article of 1890,[3]

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sion of privacy." The court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b) (1964). Appellee and appellants both moved that this court grant interlocutory appeals. We denied appellee's motion, while granting that of appellants. Our order granting appellants' motion specified that the privacy as well as the conversion question should be briefed.

[2] *Dodd* v. *Pearson*, D. D.C., 279 F.Supp. 101, 102 (1968).

[3] Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

is recognized in the District of Columbia.[4] It has always been considered a defense to a claim of invasion of privacy by publication, however, that the published matter complained of is of general public interest.[5] The columns complained of here gave appellants' version of appellee's relationship with certain lobbyists for foreign interests, and gave an interpretive biographical sketch of appellee's public career. They thus clearly bore on appellee's qualifications as a United States Senator,[6] and as such amounted to a paradigm example of published speech not subject to suit for invasion of privacy.

Indeed, appellee has not urged with any vigor on appeal the theory that appellants' publications in themselves tortiously invaded his privacy. Rather he has argued that the District Court misapprehended his privacy claim, which went rather to the manner in which the information in the columns was obtained than to the matter contained in them.

Appellee proceeds under a branch of privacy theory which Dean Prosser has labeled "intrusion," [7] and which has been increasingly recognized by courts[8] and commentators[9] in

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[4] *Afro-American Publishing Co.* v. *Jaffe,* 125 U.S.App.D.C. 70, 366 F.2d 649 (1966) (*en banc*); *Bernstein* v. *National Broadcasting Co.,* D. D.C., 129 F.Supp. 817 (1955), *affirmed,* 98 U.S.App. D.C. 112, 232 F.2d 369, *cert. denied,* 352 U.S. 945 (1956).

[5] *Afro-American Publishing Co.* v. *Jaffe, supra* Note 4; *Sidis* v. *F-R Publishing Corp.,* 2 Cir., 113 F.2d 806, *cert. denied,* 311 U.S. 711 (1940); *cf.* Warren and Brandeis, *supra* Note 3, 4 HARV. L. REV. at 214-216.

[6] Since under common law principles appellants' publication does not amount to an invasion of privacy, we need not reach the serious constitutional questions suggested by *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967).

[7] Prosser, *Privacy,* 48 CALIF. L. REV. 383, 389-392 (1960).

[8] *See* Notes 10-13 *infra.*

[9] Prosser, *supra* Note 7; *cf.* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,* 39 N.Y.U. L. REV. 962, 972-977 (1964).

recent years. Thus it has been held that unauthorized bugging of a dwelling,[10] tapping a telephone,[11] snooping through windows,[12] and overzealous shadowing[13] amount to invasions of privacy, whether or not accompanied by trespasses to property.

Unlike other types of invasion of privacy, intrusion does not involve as one of its essential elements the publication of the information obtained.[14] The tort is completed with the obtaining of the information by improperly intrusive means.

"Intrusion" has not been either recognized or rejected as a tort in the District of Columbia. It has been recognized by a number of state courts, most recently by the New Hampshire Supreme Court in *Hamberger* v. *Eastman.*[15] *Hamberger* found liable a defendant who eavesdropped upon the marital bedroom of plaintiffs by electronic means, holding that "the invasion of the plaintiffs' solitude or seclusion * * * was a violation of their right of privacy." [16]

We approve the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass

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[10] *Hamberger* v. *Eastman*, 106 N.H. 107, 206 A.2d 239 (1964); *Roach* v. *Harper*, 143 W.Va. 869, 105 S.E.2d 564 (1958).

[11] *Fowler* v. *Southern Bell Telephone & Telegraph Co.*, 5 Cir., 343 F.2d 150 (1965); *LeCrone* v. *Ohio Bell Telephone Co.*, 120 Ohio App. 129, 201 N.E.2d 533 (1963).

[12] *Souder* v. *Pendleton Detectives, Inc., La.App.*, 88 So.2d 716 (1965).

[13] *Pinkerton National Detective Agency, Inc.* v. *Stevens*, 108 Ga. App. 159, 132 S.E.2d 119 (1963).

[14] *Fowler* v. *Southern Bell Telephone & Telegraph Co., supra* Note 11, 343 F.2d at 156; *Hamberger* v. *Eastman, supra* Note 10, 206 A.2d at 242.

[15] *Supra* Note 10.

[16] 206 A.2d at 242.

or not, into spheres from which an ordinary man in a plaintiff's position could reasonably expect that the particular defendant should be excluded. Just as the Fourth Amendment has expanded to protect citizens from government intrusions where intrusion is not reasonably expected,[17] so should tort law protect citizens from other citizens. The protection should not turn exclusively on the question of whether the intrusion involves a technical trespass under the law of property. The common law, like the Fourth Amendment, should "protect people, not places." [18]

The question then becomes whether appellants Pearson and Anderson improperly intruded into the protected sphere of privacy of appellee Dodd in obtaining the information on which their columns were based. In determining this question, we may assume, without deciding, that appellee's employees and former employees did commit such an improper intrusion when they removed confidential files with the intent to show them to unauthorized outsiders.[19]

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[17] *Compare Olmstead* v. *United States,* 277 U.S. 438, 457, 464, 466 (1928), *and Goldman* v. *United States,* 316 U.S. 129, 134-136 (1942), *with Katz* v. *United States,* 389 U.S. 347, 352-353 (1967).

[18] *Katz* v. *United States, supra* Note 17, 389 U.S. at 351.

[19] Appellants have argued that appellee's employees and former employees committed neither conversion nor trespass nor invasion of privacy, because their actions are privileged by a public policy in favor of exposing wrongdoing. *See* RESTATEMENT (SECOND) OF AGENCY § 395, Comment *f* (1958):

> "An agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or of a third person. Thus, if the confidential information is to the effect that the principal is committing or is about to commit a crime, the agent is under no duty not to reveal it. * * *"

And compare Code of Ethics for Government Service, House Doc. No. 103, 86th Cong., 1st Sess. (1958): "Any person in government service should: * * * (IX) Expose corruption wherever discovered."

Although appellee's complaint charges that appellants aided and abetted in the removal of the documents, the undisputed facts, narrowed by the District Judge with the concurrence of counsel, established only that appellants received copies of the documents knowing that they had been removed without authorization.[20] If we were to hold appellants liable for invasion of privacy on these facts, we would establish the proposition that one who receives information from an intruder, knowing it has been obtained by improper intrusion, is guilty of a tort. In an untried and developing area of tort law, we are not prepared to go so far. A person approached by an eavesdropper with an offer to share in the information gathered through the eaves-

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[20] *Dodd* v. *Pearson, supra* Note 2, 279 F.Supp. at 102.

On oral argument, counsel for appellee attempted to argue that the District Court's grant of summary judgment on the issue of liability was based on some active participation in the taking of the documents on the part of appellants, rather than the mere knowing reception of the copies. The District Court's statement of essential facts gives no support to this contention, and it is laid to rest by the following colloquy between appellee's counsel and the District Judge shortly before summary judgment was granted:

> THE COURT: You are asking for summary judgment on the theory that merely receiving the documents is sufficient to make them tort feasors.
>
> MR. SONNETT: It is more than that, Your Honor * * *.
>
> Now, here I remind Your Honor that Anderson's secretary, it is undenied, Miss Ginn, participated in the secret copying of the documents.
>
> THE COURT: I am not going to decide the vital rights of either party on a little difference in immaterial detail.
>
> As I read your statement of facts, and if I misread it I want you to tell me, you are basing your case for summary judgment on the ground that an unlawful act was committed by the receipt of stolen letters.
>
> MR. SONNETT: Knowingly.
>
> THE COURT: Knowing them to have been stolen.
>
> MR. SONNETT: And publicizing them; both.
>
> THE COURT: Well, of course.

dropping would perhaps play the nobler part should he spurn the offer and shut his ears. However, it seems to us that at this point it would place too great a strain on human weakness to hold one liable in damages who merely succumbs to temptation and listens.

Of course, appellants did more than receive and peruse the copies of the documents taken from appellee's files; they published excerpts from them in the national press. But in analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate. Where there is intrusion, the intruder should generally be liable whatever the content of what he learns. An eavesdropper to the marital bedroom may hear marital intimacies, or he may hear statements of fact or opinion of legitimate interest to the public; for purposes of liability that should make no difference. On the other hand, where the claim is that private information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained. Of course, both forms of invasion may be combined in the same case.

Here we have separately considered the nature of appellants' publications concerning appellee, and have found that the matter published was of obvious public interest. The publication was not itself an invasion of privacy. Since we have also concluded that appellants' role in obtaining the information did not make them liable for intrusion to appellee, their subsequent publication, itself no invasion of privacy, cannot reach back to render that role tortious.

II

The District Court ruled that appellants' receipt and subsequent use of photocopies of documents which appellants

knew had been removed from appellee's files without authorization established appellants' liability for conversion. We conclude that appellants are not guilty of conversion on the facts shown.

Dean Prosser has remarked that "[c]onversion is the forgotten tort." [21] That it is not entirely forgotten is attested by the case before us. History has largely defined its contours, contours which we should now follow except where they derive from clearly obsolete practices or abandoned theories.[22]

Conversion is the substantive tort theory which underlay the ancient common law form of action for trover. A plaintiff in trover alleged that he had lost a chattel which he rightfully possessed,[23] and that the defendant had found it and converted it to his own use. With time, the allegations of losing and finding became fictional, leaving the question of whether the defendant had "converted" the property the only operative one.[24]

The most distinctive feature of conversion is its measure of damages, which is the value of the goods converted.[25]

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[21] Prosser, *The Nature of Conversion*, 42 CORN. L. Q. 168 (1957).

[22] *Cf. id.* at 169: "The hand of history lies heavy upon the tort of conversion."

[23] A threshold question, not briefed by either party and hence not decided by us, is the nature of the property right held by appellee in the contents of the files in his Senate Office. Those files, themselves paid for by the United States, are maintained in an office owned by the United States, by employees of the United States. They are meant to contribute to the work of appellee as an officer of the United States. The question thus is not entirely free from doubt whether appellee has title to the contents of the files or has a right of exclusive possession of those contents, or is a bailee, or even a mere custodian of those contents.

[24] *See generally* Ames, *The History of Trover*, 11 HARV. L. REV. 277, 374 (1898).

[25] 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 2.36 (1956).

The theory is that the "converting" defendant has in some way treated the goods as if they were his own, so that the plaintiff can properly ask the court to decree a forced sale of the property from the rightful possessor to the converter.[26]

Because of this stringent measure of damages, it has long been recognized that not every wrongful interference with the personal property of another is a conversion.[27] Where the intermeddling falls short of the complete or very substantial deprivation of possessory rights in the property, the tort committed is not conversion, but the lesser wrong of trespass to chattels.[28]

The Second Restatement of Torts has marked the distinction by defining conversion as:

> "* * * [A]n intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." [29]

Less serious interferences fall under the Restatement's definition of trespass.[30]

The difference is more than a semantic one. The measure of damages in trespass is not the whole value of the property interfered with, but rather the actual diminution in its

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[26] Prosser, *supra* Note 21, 42 CORN. L. Q. at 170.

[27] *See, e.g., Fouldes* v. *Willoughby,* 151 Eng.Rep. 1153 (Exch. 1841).

[28] Prosser, *supra* Note 21, 42 CORN. L. Q. at 170-173.

[29] RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965).

[30] *Id.,* § 217: "A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another."

value caused by the interference.[31] More important for this case, a judgment for conversion can be obtained with only nominal damages, whereas liability for trespass to chattels exists only on a showing of actual damage to the property interfered with.[32] Here the District Court granted partial summary judgment on the issue of liability alone, while conceding that possibly no more than nominal damages might be awarded on subsequent trial. Partial summary judgment for liability could not have been granted on a theory of trespass to chattels without an undisputed showing of actual damages to the property in question.

It is clear that on the agreed facts appellants committed no conversion of the physical documents taken from appellee's files. Those documents were removed from the files at night, photocopied, and returned to the files undamaged before office operations resumed in the morning. Insofar as the documents' value to appellee resided in their usefulness as records of the business of his office, appellee was clearly not substantially deprived of his use of them.

This of course is not an end of the matter. It has long been recognized that documents often have value above and beyond that springing from their physical possession.[33]

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[31] 1 F. HARPER & F. JAMES, *supra* Note 25, § 2.6.

[32] "To support an action of trespass to a chattel where the invasion of interests does not result in its destruction or in a dispossession thereof, it was early held there must be some physical harm to the chattel or to its possessor. Unlike the action of trespass quare clausum fregit in the case of land, no action could be maintained for a mere harmless intermeddling with goods. The possessor's proprietary interest in the inviolability of his personal property did not receive that protection which the similar interest in the possession of land or the dignitary interest in the inviolability of the person receives. * * *"

1 F. HARPER & F. JAMES, *supra* Note 25, § 2.3. (Footnotes omitted.)

[33] *United States* v. *Bottone*, 2 Cir., 365 F.2d 389, *cert. denied*, 385 U.S. 974 (1966).

They may embody information or ideas whose economic value depends in part or in whole upon being kept secret. The question then arises whether the information taken by means of copying appellee's office files is of the type which the law of conversion protects. The general rule has been that ideas or information are not subject to legal protection,[34] but the law has developed exceptions to this rule. Where information is gathered and arranged at some cost and sold as a commodity on the market, it is properly protected as property.[35] Where ideas are formulated with labor and inventive genius, as in the case of literary works[36] or scientific researches,[37] they are protected. Where they constitute instruments of fair and effective commercial competition, those who develop them may gather their fruits under the protection of the law.[38]

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[34] *See International News Service* v. *Associated Press,* 248 U.S. 215, 246 (1918) (opinion of Mr. Justice Holmes).

The traditional rule has been that conversion will lie only for the taking of tangible property, or rights embodied in a tangible token necessary for the enforcement of those rights. *See* 1 F. HARPER & F. JAMES, *supra* Note 25, § 2.13; Annot., *Property—Subject to Conversion,* 44 A.L.R.2d 927 (1955); *Mackay* v. *Benjamin Franklin Realty & Holding Co.,* 288 Pa. 207, 135 Atl. 613 (1927). This overly restrictive rule has recently been relaxed in favor of the reasonable proposition that any intangible generally protected as personal property may be the subject matter of a suit for conversion. *See Evans* v. *American Stores Co.,* Philadelphia Ct. Common Pleas, 3 Pa.D.&C.2d 160 (1955).

[35] *International News Service* v. *Associated Press, supra* Note 34.

[36] This protection is developed by the branch of the law known as common-law copyright, which reserves to an author the right of first publication of his work. *See generally* Annot., *Literary or Artistic Property Rights,* 23 A.L.R.2d 244 (1952).

[37] *See, e.g., United States* v. *Bottone, supra* Note 33 (employees who sold photocopies of documents describing drug company's methods of manufacture convicted of transporting stolen goods across state lines).

[38] *See, e.g., Evans* v. *American Stores Co., supra* Note 34.

The question here is not whether appellee had a right to keep his files from prying eyes, but whether the information taken from those files falls under the protection of the law of property, enforceable by a suit for conversion. In our view, it does not. The information included the contents of letters to appellee from supplicants, and office records of other kinds, the nature of which is not fully revealed by the record. Insofar as we can tell, none of it amounts to literary property, to scientific invention, or to secret plans formulated by appellee for the conduct of commerce. Nor does it appear to be information held in any way for sale by appellee, analogous to the fresh news copy produced by a wire service.[39]

Appellee complains, not of the misappropriation of property bought or created by him, but of the exposure of information either (1) injurious to his reputation or (2) revelatory of matters which he believes he has a right to keep to himself. Injuries of this type are redressed at law by suit for libel and invasion of privacy respectively, where defendants' liability for those torts can be established under the limitations created by common law and by the Constitution.[40]

Because no conversion of the physical contents of appellee's files took place, and because the information copied from the documents in those files has not been shown to be property subject to protection by suit for conversion,

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[39] *See International News Service* v. *Associated Press, supra* Note 34.

[40] We have held that appellee is not entitled to summary judgment for invasion of privacy. Appellee originally sued appellants for libel, but has dropped this claim during the course of the litigation.

the District Court's ruling that appellants are guilty of conversion must be reversed.

So ordered.

TAMM, *Circuit Judge,* concurring. Some legal scholars will see in the majority opinion—as distinguished from its actual holding—an ironic aspect. Conduct for which a law enforcement officer would be soundly castigated is, by the phraseology of the majority opinion, found tolerable; conduct which, if engaged in by government agents would lead to the suppression of evidence obtained by these means, is approved when used for the profit of the press. There is an anomaly lurking in this situation: the news media regard themselves as quasi-public institutions yet they demand immunity from the restraints which they vigorously demand be placed on government. That which is regarded as a mortal taint on information secured by any illegal conduct of government would appear from the majority opinion to be permissible as a technique or modus operandi for the journalist. Some will find this confusing, but I am not free to act on my own views under the doctrine of stare decisis which I consider binding upon me.

I concur, therefore, in Judge Wright's disposition of this case albeit I have some difficulty in concluding that the appellee would be without legal remedy if the entire factual situation herein were before us on pleadings encompassing all possible legal aspects suggested by the facts. Our review is, however, confined to a limited area, compressed by the amended complaint, restricted by certain stipulations, and curbed by our consideration only of the propriety of the trial court's action upon a motion for summary judgment. We must predicate our judgment upon the record as it

comes to us, not upon some theoretical or philosophical idea of what the record might have been had the pleadings and the record in the trial court presented us with a wide latitude for study and a multiple selection of possible dispositions. Upon the present record we have more voice than power.